

IN THE HIGH COURT OF DELHI

CM(M) No.829/07

Yuvneet Suri & Anr. Petitioners
through: Mr.Raghu Nayyar, Advocate.

VERSUS

\$ M/s Round The Clock Stores Ltd. Respondent
through: Mr.P.K. Jain, Advocate.

RESERVED ON: 11.12.2007

% DATE OF DECISION: 13.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Vide present petition under Article 227 of the Constitution of India petitioners have laid a challenge to the order dated 08.05.07 passed by the learned Additional District Judge, Delhi.

2. By and under the impugned order the learned Trial Court has allowed an application under Order XXXVII Rule 3(5) CPC filed by the petitioners seeking leave to defend a recovery suit filed by the respondent company under Order XXXVII CPC.

3. Facts necessary to dispose of the present petition are that the respondent company filed a suit under Order XXXVII CPC against the petitioners for recovery of Rs.3.5 lakhs. Suit was based

upon a written agreement dated 15.12.03 entered into between the respondent company and petitioner no.1 Yuvneet Suri. Material averments in the plaint were that:-

I Respondent company had employed petitioner no.1 as a Restaurant General Manager under a letter of appointment dated 07.12.03.

II As per the terms of the employment petitioner no.1 was required to go United States of America for the period between December 2003 and March 2004 to undergo training in the field of Restaurant Operation.

III Entire expenditure incurred by the petitioner no.1 in connection with the training was to be borne by the respondent company.

IV A further term of employment was that the petitioner no.1 had to serve the respondent company for a period of 3 years from the date of the successful completion of the training.

V As a guarantee for the same, petitioner no.1 executed a written agreement dated 15.12.2003.

VI Petitioner no.2 Mr. Rajesh Kwatra has guaranteed the due performance of the written agreement dated 15.12.03.

VII Clause V of the agreement stipulated that the petitioner no.1 shall remain in the employment of the respondent company for a period of three from the date of the successful completion of the training failing which petitioner no.1 shall pay damages in sum of Rs.3.5 lakhs to the respondent company.

VIII Petitioner no.1 was required to remain in the employment of the respondent company for a period of 3 years from 19.05.04 to 18.05.07.

IX Petitioner no.1 abruptly and without giving any intimation left the services of the respondent company w.e.f. 15.02.06.

4. Petitioners filed an application under Order XXXVII Rule 3(5) CPC seeking leave to defend. Leave to defend was sought on following grounds:-

I Agreement dated 15.12.03 has no legal sanctity as it was got executed by the respondent company by exerting '*undue influence*' on the petitioner no.1. That petitioner no.1 was not informed by the respondent company about the stipulations contained in Clause V of the agreement at the time of his appointment in the respondent company and that he was compelled to sign the agreement in as much as he had made all arrangements to fly to the United States of America.

II Since respondent company was conducting its business in an illegal manner and contrary to the accepted trade norms petitioner no.1 had no option but to leave the employment.

III Respondent no.1 is wrong in contending that the petitioner no.1 had abruptly and without giving any intimation left the employment in as much as petitioner no.1 has duly submitted a resignation letter dated 14.02.06 to the respondent company.

5. After noting the respective contentions of the parties the

learned Trial Court has opined and in my opinion rightly so, that the controversy in the instant suit centers around the fact that whether the petitioner no.1 had executed agreement dated 15.12.03 under a compulsion.

6. As already noted vide impugned order dated 08.05.07 the learned Trial Court refused to grant leave to defend to the petitioners and thus dismissed the application of the petitioners. The necessary consequence of the dismissal of the application was that the suit of the respondent company was decreed. A decree was passed in favour of the respondent company directing the petitioners to pay a sum of Rs.3.5 lakhs together with interest @ 6% per annum from the date of filing the suit till date of realization.

7. After considering catena of judicial pronouncements on the subject of Order XXXVII CPC following legal principles can be culled out:-

I The question to be considered in applications under Order 37, Rule 3, Civil Procedure Code, is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must, as a rule, bring something more before the Court to show that it has a bona fide defence and is not a mere attempt to gain time by getting leave to defend.

II If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the

claim is based on the uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses then leave to defend should not be denied.

III If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

IV If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the defendant is entitled to unconditional leave to defend.

V Even in cases where defendant shows that on a fair probability he has a bona fide defence, he ought to be granted leave to defend.

VI Leave to defend should not be refused where serious conflict as to matter of fact or where any difficulty on issues as to law arises.

VII The Courts should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

VIII At the stage of granting leave to defend, the Courts can only consider whether the facts as alleged by the defendant, if true, afford a good defence and not whether they are true or not.

IX If the defendant disclosed such facts as may be deemed

sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet shows such a state of facts which leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

X Leave to defend is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even plausible defence on those facts.

XI If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

XII If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and given leave to the defendant on such condition, and thereby show mercy to the

defendant by enabling him to try to prove a defence.

8. In the backdrop of afore-noted legal principles, it has to be seen that whether the application seeking leave to defend filed by the petitioners discloses a bona fide dispute or not. In order to determine the same it is necessary to note the documents filed by the petitioners.

9. The first document is the letter of intent dated 22.11.03 issued by the respondent company. The letter informs the petitioner no.1 that he has been selected for the post of Restaurant General Manager in the respondent company. The letter further informs that the petitioner no.1 is required to deposit a sum of Rs.25,000/- with the respondent company and that this deposit shall be refunded to him only if completes three years of service with the respondent company. The letter also records that if the respondent company decides to send petitioner no.1 for training to USA petitioner no.1 will have to give an undertaking that he remain in the employment of the respondent company for a period of three years. It is relevant to note that this letter nowhere talks about service bond in Rs.3,50,000/- to be executed by the petitioner no.1.

10. The next document is letter of appointment dated 07.12.03. which records the terms of the employment. This letter also does not talks about any service bond.

11. The next two documents are the letters the dated 5.12.2003 and 8.12.2003 issued by the respondent company to the US embassy requesting the embassy to grant a Visa to the

petitioner no.1. These letters evidence that the respondent company had started making travel arrangements for US visit of the petitioner no.1 even before he was appointed.

12. Next comes the agreement dated 15.12.03 which for the first time states that the petitioner no.1 will have to pay damages in sum of Rs.3,50,000/- to the respondent company in case he leaves the employment before the period of three years.

13. Considering the afore-noted documents in totality the defence is probable that the respondent company taking advantage of the fact that the petitioner No.1 had already deposited a sum of Rs.25,000/- and left the previous employment was compelled to execute the bond dated 15.12.2003.

14. In order to constitute undue influence following two basic elements must be cumulatively present;-

I Relations between the parties to the contract must be such that one of the parties is able to dominate the will of the other; and

II Party in dominating position uses the position to obtain an unfair advantage over the other.(see Section 16, Indian Contract Act, 1872)

15. In the present case the ingredients constituting undue influence can be proved at the trial at the time when agreement dated 15.12.03 was executed and thus it can be established that the agreement has no legal force as being hit by Section 19-A of the Indian Contract Act, 1872.

16. Before concluding I note the judgment of the Bombay High Court in the decision reported as Yogendra Patwardhan v. Khandelwal Hermann Electronics Ltd 1988 (90) BomCR 560. Facts of the case were that the respondent company had employed the petitioner as a sales-engineer. While the petitioner was in the employment of respondent company it was decided by the respondent company to send some of its personnel including the petitioner in a fair in West Germany. The case set up by the respondent company was that the petitioner executed a written undertaking dated 29.10.86 which stipulated that the petitioner will remain in the employment of the respondent company till 30.11.87 and if the petitioner was to leave the employment without the prior consent of the respondent company within the aforesaid period, the petitioner shall pay to the respondent company a sum of Rs.12,000/-. Alleging that the petitioner immediately after the return from the West Germany on or about 8.12.86 resigned from the employment of the respondent company, the respondent company had filed a recovery suit under Order XXXVII CPC. Defence set up by the petitioner was that he had signed the said undertaking under compulsion. Noting the rival versions of the parties the Bombay High Court has opined that the triable issues arise in the case.

17. In view of the above discussion I dispose of the present petition by holding as under:-

I Impugned order dated 08.05.07 passed by the learned Additional District Judge, Delhi is set aside.

II Unconditional leave to defend the instant suit is granted
to the petitioners.

18. No costs.

December 13, 2007
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PRADEEP NANDRAJOG